UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SONY MUSIC ENTERTAINMENT, et al., Plaintiffs,	
-vs-	Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al., Defendants.	

STATUS CONFERENCE

November 26, 2019

Before: Liam O'Grady, USDC Judge

APPEARANCES:

Matthew J. Oppenheim, Scott A. Zebrak, Jeffrey M. Gould, and Jia Ryu, Counsel for the Plaintiffs

Thomas M. Buchanan, Michael S. Elkin, Jennifer A. Golinveaux, Thomas P. Lane, Sean R. Anderson, and Cesie C. Alvarez, Counsel for the Defendants

THE CLERK: The Court calls case 1:18-cv-950, Sony Music Entertainment, et al., versus Cox Communications, Inc., et al., for a status conference.

May I have the appearances, please, first for the plaintiffs.

MR. ZEBRAK: Good morning, Your Honor. Scott Zebrak for the plaintiffs of the law firm of Oppenheim + Zebrak, LLP. With me are my colleagues Matthew Oppenheim, Jeffrey Gould, and sitting at the table behind us is Jia Ryu.

MR. OPPENHEIM: Good morning.

THE COURT: All right. Good morning to each one of you.

MR. BUCHANAN: Good morning, Your Honor. Thomas Buchanan on behalf of the defendant, Cox. And with me at counsel table are my partners Jennifer Golinveaux, Michael Elkin.

And behind me is Tom Lane, Cesie Alvarez, and Sean Anderson.

THE COURT: All right. Good morning to each one of you.

MR. BUCHANAN: Thank you, Your Honor.

THE COURT: All right. Well, we've gotten together to discuss final issues before trial next Monday. I don't have any good news for your Sony executives, there will be no cell phones coming in. I know that was going to be your first

question today.

You know, I have some questions that -- and I'll be happy to answer any ones that you all have. But one of my questions is, there's -- I took a quick look at the jury instructions, and there is some dispute as to where the DMCA comes in. And, obviously, the safe harbor is not a defense. But certainly the Act has application. And I don't know where -- when Cox says it has no application here, I'm just not sure what that means.

So maybe help me out there.

MS. GOLINVEAUX: Good morning, Your Honor.

Your Honor, in the first BMG trial you gave an instruction with respect to DMCA at the end of the case. And then when we were coming to try the second trial, you indicated you would give a similar instruction, but at the beginning of the case and it would be forward looking.

And in that -- in that instruction you explained, in a more neutral way than plaintiffs propose, what the DMCA defense is. And you indicated, but it's not a defense in this case.

And what we did is we proposed something slightly different because the DMCA was not asserted as a defense in this case. It was not litigated. There are different facts here. We didn't think that that language was appropriate. It would be misleading to the jury because it would indicate

somehow that there had been a determination about DMCA safe harbor.

So that's why we worded our proposed instruction the way we did.

THE COURT: Okay. All right, that helps. Thank you.

MR. OPPENHEIM: May I speak to the issue?

THE COURT: Yes, sir.

MR. OPPENHEIM: Good morning, Your Honor.

THE COURT: Good morning.

MR. OPPENHEIM: Your Honor, I think this is a fairly critical and fundamental issue. Cox will likely argue either explicitly or implicitly that ISPs should not be held liable for infringement on their network. And that even if they don't argue that, the jury may well wonder about that based on the arguments that are put before them.

You know, what are we doing here if we're holding an ISP liable for damages? And in that sense, the jury needs to know that there is a whole statutory regime that is set up that provides ISPs with total protection from liability for damages, money damages. And that that is not an issue in this case.

So that has to be explained to the jury so that they understand they are not deciding the fundamental question of, well, boy, should ISPs be subject to monetary damages for what happens on their network? They need to understand that the law has a provision for this, but it doesn't apply here. So that's

number one.

Two, the instruction that Cox has proffered doesn't even make any sense because the term "DMCA" appears throughout the defendants' documents. And, frankly, even some of the plaintiffs' documents. And by saying, basically, that the jury should ignore it, is to tell the jury to ignore important information within those documents.

The Cox witnesses testified, you know, that the DMCA is a shorthand reference to the copyright laws. And the jury is going to need to understand that so that they can understand those documents.

THE COURT: What witness would you be proposing to introduce any evidence about the Act and its parameters?

MR. OPPENHEIM: So there is no question, Your Honor, that the plaintiffs sent their notices based on their understanding of the law. I mean, it motivated the sending of the notices, both the DMCA law and the underlying contributory law.

And so, I expect that there will be potentially multiple witnesses who would speak to that as to why the plaintiffs sent their notices.

Now, we don't presume to put somebody up who we're going to ask the Court to opine as an expert on what the law is because that's -- that would be an improper use of an expert, in my opinion.

So we're not trying, Your Honor, to put a thumb on the scale in our proposed instruction by saying, look, their conduct was so bad that they don't get the benefit of this provision.

We haven't suggested anything like that. We're just trying to explain to the jury what the statutory provision is and it's not available in this case for Cox.

THE COURT: Okay, understood.

You may reply if you would. And, you know, I've allowed the information regarding the CAS because I believe it was relevant because Sony and other plaintiffs signed onto that -- well, MOU or whatever it was. And also that the study, Friedberg study, was done.

But doesn't it all involve the notices, the notices are coming out because of the DMCA, and what Cox did in response to -- even though they are not a signer of the CAS agreement, the whole graduated program, it's all around the DMCA, right? How do you excise one portion of it and give the jury an understanding of what's going on?

MS. GOLINVEAUX: Well, Your Honor, I think what the plaintiffs are doing is exactly trying to put the thumb on the scale with respect to DMCA. It was not litigated in this case. Cox responded to notices with its graduated response as it found appropriate. The DMCA statute explicitly states that qualification for safe harbor does not have any determination

on any underlying liability under the common law.

So for them to come in with an instruction at the beginning of the case and say, here is what the safe harbor was out there and here is what it required and, by the way, Cox does not qualify for it, is inappropriate when the defense has not been litigated in this case.

And it's a separate issue from CAS, Your Honor. CAS was an agreement where the plaintiffs worked out what they felt was important with the other major ISPs in an agreement they reached and is separate and apart from the DMCA.

THE COURT: Well, the safe harbor provision has been litigated and it was litigated in BMG. And Cox was found not to have the ability to use it. And I realize that, you know, the Rightscorp/Cox negotiations, which ended with them not receiving notices, is factually different, and that's why I made some rulings that I made pretrial. It's a different case.

But as far as Cox and the safe harbor provisions, I am not so sure that's not an estoppel issue.

MS. GOLINVEAUX: Well, Your Honor, it really is a different set of facts, as you have indicated. Here there is going to be no dispute under the evidence that Cox processed all of plaintiffs' notices under its graduated response.

Defendants will also put on evidence that it terminated more than 30 subscribers during the claims period, and 13 of those subscribers specifically who had received the

plaintiffs' notices.

So you really have a different set of facts even with respect to the safe harbor qualifications in this case.

THE COURT: All right. Mr. Oppenheim.

MR. OPPENHEIM: I am madly leafing through your summary judgment opinion in the BMG case, and I'm having trouble finding precisely what I was looking for. But you wrote, in finding that Cox didn't get the benefit of the safe harbor, that that wasn't just limited to Rightscorp notices.

And that's the point, Your Honor. To get up and say, well, we didn't litigate it, you know, we didn't assert the defense, because they knew as a legal matter that had they, it would have been frivolous. The Court had already opined on it. And as a matter of law of collateral estoppel, they can't assert that defense.

So for them to make that argument is disingenuous, Your Honor.

Your Honor, we're not attempting to use DMCA to bootstrap our way to liability in any way. And our instruction, if you read it, doesn't try to do that at all. We really did try to articulate exactly what the law is. Why would we blind the jury into understanding the legal regime that they're deciding this case within? And that's the question.

And there is no doubt that when Cox argues their

case, they're going to say over and over and over again, they're going to ask witnesses questions and make arguments about, you know, an ISP cutting off their users and, you know, what an ISP should do and what they should be held liable for doing.

And this jury needs to know, they can escape all of that liability if they just -- all they have to do is fulfill a relatively easy provision with the DMCA that they didn't fulfill.

And so, the jury really should understand the permutation of what they're dealing with.

THE COURT: Okay. All right. Well, I will look at the instructions further. I think that Cox is estopped from asserting the safe harbor provision and some instruction is appropriate, but I'll look a little further at it.

So the next issue I would like to address is that the District of Columbia did something timely and transferred the RIAA subpoena duces tecum to the EDVA. And I don't know whether there is -- that you want to pursue this before Judge Anderson, but I wanted to bring up the fact that it had been transferred and that it's before the Court.

Mr. Buchanan.

MR. BUCHANAN: Yes, Your Honor. I think you are being generous on suggesting that the District of Columbia acted quickly. That has been there for sometime.

We actually finally sent a letter -- I believe the plaintiffs indicated that they were willing to transfer it. We filed it there because we thought there was jurisdiction just there. But then there was a provision that allows the opposing party to say, look, we'll transfer it. So they did it here.

And so, we've subpoenaed these records, and we think they're relevant to our case. These are reports that were going to the RIAA with regard, I believe, to CAS and notice of infringement and responses. And we never really got a response from the RIAA whether they have these documents. They have just opposed producing them.

And so, we think they are relevant. CAS is relevant. Responses to e-mails both by Cox subscribers -- there is a whole system set up whereby the ISPs that were part of CAS would send information to the copyright information center that was sort of managing the process. There were notices that were supposed to go to MarkMonitor and the information that was supposed to go to the RIAA. And that is all relevant as to what subscribers were saying and responding to notices to indicate, you know, hey, I got one notice, two or three.

Well, they're saying, look, my grandkids did this, I just came up. How do I deal with it? I have got open Wi-Fi. You know, I've got problems with the router. And we have like 1,700 e-mails along those lines.

But a lot of this information was supposed to be sent

to the RIAA as part of their agreements through CAS. And so, we think that is very relevant. Because their idea is to terminate at one, two, three, four, or five. Well, that means these people knew exactly what they were doing when it happened and they should be cut off, their lifeline.

And what this shows is, hey, the idea of educating them and finding out what's going on and acting on a gradual response way is very relevant. And that's what CAS was. They had one a week and then they had -- that's a notice, one per week, and they had caps, and they had six notices. So that would be six weeks of notices and still no requirement to terminate.

But within that there was information that was supposed to be sent back to the RIAA about what was happening.

THE COURT: Well, Cox wasn't a signatory of CAS, right?

MR. BUCHANAN: No, we were not. We considered it and we did not pursue it. And because of the fact we thought our system was, instead of less tolerant, as their experts seem to suggest without considering CAS, it was more restrictive.

And as the evidence will show, by the third or fourth notice 80 percent of the people that received an RIAA notice never got another one.

THE COURT: And was this not litigated before Judge Anderson when he --

MR. BUCHANAN: It was not. As I said, Your Honor, we filed it in D.C. because that's where the RIAA is. And this is a third-party issue. So we did not believe that Judge Anderson --

THE COURT: I know the subpoena wasn't litigated in front of him, but was the issue of the discovery, whether it was relevant and should be produced separately --

MR. BUCHANAN: There were some decisions, but we don't believe that this specific group of documents was covered by any prior ruling.

THE COURT: Okay.

MR. BUCHANAN: I know they're suggesting it was, but we think it was separate and distinct.

THE COURT: Do you want to respond, Mr. Gould?

MR. GOULD: Thank you, Your Honor.

We really need to level set the history here to talk about how this lands on your desk on the eve of trial. And it goes back to January 2018 when Cox served a subpoena on RIAA. RIAA responded in writing, produced documents, exchanged letters and phone calls on conferrals. Nine months passed and ten months passed, and here we are today.

The RIAA sat for a deposition in June. More time passed.

In January Cox filed a very large omnibus motion to compel before Judge Anderson seeking all things under the sun

related to CAS. And Judge Anderson reviewed that in great detail and sliced very thinly what he believed was appropriate and relevant for production under CAS. And we produced that. And Cox took discovery on that.

More months passed, more silence as to this category of documents they want from the RIAA.

Discovery closed on July 2 after seven months, which, as you know, is considerably longer than the norm in this court. During that time the parties sought an additional enlargement from the prior enlargement. And Judge Anderson made very clear that no further enlargements of discovery shall be had -- shall be had.

Discovery closed on July 2. Still no word or mention of this issue from Cox. Six more weeks passed. The pretrial, final pretrial conference passed. And six weeks after the close of discovery in late August Cox filed a motion to compel RIAA in the District of Columbia with no mention of this to plaintiffs. This was surprising to us to say the least.

We then asked Cox if they would consent to transfer to this Court for quick resolution before Judge Anderson who, we explained to them, had already addressed this issue.

Cox declined that transfer. And the reason was clear, they were forum shopping for a different ruling from a different court without the benefit of context of the entire case and the closely related case that had preceded here four

years before that.

What happens? We filed an opposition explaining that the motion should be denied on multiple grounds, it was untimely, Judge Anderson had already ruled on it, and on the merits. And we moved in the alternative for transfer to this venue because we believed Judge Anderson or yourself would be best equipped to unpack this lengthy and detailed history, including the prior rulings and the impact of those.

Then the papers sat quietly at the District of Columbia for sometime and have recently found their way back to this Court. We believe, Your Honor, that this is completely out of bounds and improper to be pursuing at this point. We explained in the papers why it's untimely, why it's been ruled on already, and why, even if that's not the case, the motion is improper on its merits.

We're happy to argue further. I think you understand the position. If you have any questions -- I'm sorry, the subpoena was January 2019, my colleague corrected me. I misspoke 2018.

THE COURT: Thank you.

MR. GOULD: If there are any further questions --

THE COURT: All right. Thank you, sir.

Mr. Buchanan.

MR. BUCHANAN: Your Honor, so with regard to Judge Anderson's ruling on CAS, we did have a lengthy request.

And what he ruled was that we could get the memorandum of understandings and the implementation agreements. And he did not -- we did not know until we got these other documents that there was actually this internal policy and process by which notices would be received and responses from subscribers once those notices had been forwarded by e-mail by the members of CAS, that they were supposed to respond and data would be collected. So there was no way we could anticipate that that evidence would be there.

And so, the RIAA is in D.C. We went there and we pursued it there. And the judge just didn't move on it until we wrote a letter recently asking him, saying there is a trial coming up, could we get a ruling. And then, and then he sent it. Otherwise it would have never been ruled on.

So, you know, it was after the end of discovery, but that was because we were still negotiating and talking with them about getting these documents.

And so, when they finally said that was it -- because they did produce some things -- then we filed the motion -- rather the -- yes, the motion in D.C.

So it's clearly, I think, relevant to this case. It wouldn't be that hard for them to produce it. And it is consistent with what they were doing with CAS.

THE COURT: All right. Well, you know, with the marginal relevance given the fact that you are not a signatory,

but more importantly it is way outside of discovery and the close of discovery, and I understand it is a subpoena duces tecum to a party at the location of a party, which is proper, but this needed to go through Judge Anderson.

And if Cox was going to attempt to get this additional discovery and -- it's unfortunate it wasn't timely supplied so that it could have been presented to Judge Anderson and that you could have had the opportunity -- but discovery closed in July. The parties have been working towards resolution and trial in this case for months with all the motions that have been filed. And it's clearly too late and prejudicial.

And I am going to not allow the -- I am going to quash the subpoena at this time.

All right. From Cox, I'm interested in whether you have evidence of the knowledge by your -- the group at Cox about the graduated response program and its effectiveness, which is timely and makes relevant the testimony of Weber at least. And I -- because, you know, BMG didn't really deal with Sony.

What witnesses do you expect to have? I'm looking for just an overview that there is relevance to putting an expert on to say, I've gone through every one of these notices and this is what they say, and it's relevant because Cox employees were following and tracking that data

contemporaneously.

MR. ELKIN: Sure. Good morning, Your Honor.

THE COURT: Good morning.

MR. ELKIN: I want to just comment, if I can, when I sort of finish responding to Your Honor's question, about something I think that Your Honor mentioned a few minutes ago so that there is no surprise with regard to certain evidence as it relates to the MOU.

But in response to your question, we will have the testimony of a number of Cox witnesses, including Matt Carothers and Brent Beck. I believe both of them are expected to be called as hostile witnesses to support plaintiffs' case in chief.

There are other witnesses that have -- that will testify with regard to, for Cox, Linda Trickey, which is a subject of discussion that I think plaintiffs will want to bring up as they wish to now call her in support of their case in chief, something that we have an issue about in terms of logistics.

And there may be -- and there is some testimony -- although Your Honor did strike Mr. Cadenhead's PowerPoint slide, there is testimony in his videotape deposition that we also believe would provide a predicate for Weber's opinions.

One thing I did want to mention, Your Honor, just because I don't want there to be any surprises, in the MOU

itself it is very clear, and the witness testimony in the case that we've taken, the third-party witness testimony bears this out, there were indeed specific explicit references in the MOU to the DMCA. And, specifically, that the DMCA, in terms of the repeat infringer policies and the parties' respective rights, were unaffected, explicitly unaffected. And this is borne out in the testimony itself.

So our position, not to say that it's going to have any bearing on Your Honor's decision on the opening instruction, but to the extent that Your Honor's decision hinges on the extent to which the MOU encompasses or envisages this notion to DMCA, it explicitly says it doesn't apply.

THE COURT: Okay.

MR. ELKIN: Thank you, Your Honor.

THE COURT: Thank you. Mr. Oppenheim.

MR. OPPENHEIM: So the issue you have raised, Your Honor, with respect to Weber is actually an issue we wanted to raise. Actually, it -- there are a couple of different pieces to it, if I may.

So, first off, the Court ruled on the 96 percent study after thorough briefing and argument. And I want to make sure we understand that Dr. Weber can't get up and testify as to the 96 percent study. I assume that's the case.

THE COURT: He can't use that document as his evidence. If Weber has gone through every notice and

separately looked at the numbers of notices or tickets and gone through that, then, you know, that was not precluded by my ruling.

MR. OPPENHEIM: Right. She, she can testify, that we understand from your ruling, on any analysis she has done.

THE COURT: Correct.

MR. OPPENHEIM: But she can't corroborate her conclusions by pointing to the 96 percent study, which is what she does in her opinion.

THE COURT: She cannot.

MR. OPPENHEIM: The second thing that Dr. Weber does is she relies on 20 hand-picked e-mails from Cox subscribers. So there was a motion in limine -- this is the intersection of the Daubert motion and the motion in limine.

There was a motion in limine on the Cox subscribers' e-mails. And if I understand the Court's ruling, the Court said, to the extent that Cox can lay a foundation on those e-mails, they can admit them for the very limited purpose of speaking to what Cox's state of mind was at the time based on those e-mails.

But they certainly can't admit them, as I understand -- and you didn't say this, Your Honor, but this is how I read your opinion -- for purposes of saying, this Cox subscriber said they were -- they hadn't done it, so they didn't do it. And so, here, jury, you should see, this

infringement didn't occur.

That's how I --

THE COURT: Well, they were not admitted for the truth of them. They are admitted as notice that Cox had information from customers saying, hey, you know, the system is obviously not perfect. So I think it was permissible for the notice to Cox.

MR. OPPENHEIM: To the extent that Cox has anybody who can testify that they read them at the time, we understand they can come in for that very limited purpose.

Dr. Weber relies on a hand-picked 20 of those e-mails to opine that many of Cox's subscribers are innocent or well-intentioned. And she says she has a background in doing consumer behavior studies. And so, based on that background, she can read these e-mails and determine that, in fact, some of these subscribers are innocent and well-intentioned. And, therefore, it would be punitive, and these are her words, punitive to terminate Cox subscribers with only a handful of notices.

And as -- she is relying on the very thing I understand as a matter of hearsay Your Honor has said is not admissible. So, I guess I'm looking for a little clarification that she can't opine on that.

THE COURT: Understood.

MR. OPPENHEIM: Okay. So I know I have not gotten to

your issue yet, which I will get to next.

And so, then I believe that the question you asked, Your Honor, was what evidence of knowledge of the effectiveness of graduated response will be coming in and through whom. Well, this is a little troubling. I mean, in discovery we very clearly asked for all studies. The only --

THE COURT: I wasn't asking for studies. I was asking for evidence that Cox was intending to put on that somebody contemporaneously understood from the responses to the graduated response program that their customers were being educated and that after three or five notices, that they stopped coming up in their database. Right?

MR. OPPENHEIM: We're concerned, Your Honor, that Cox is going to put its witnesses up to testify to something for which they have zero foundation. Because the only foundation they could have had was this 96 percent study.

So Mr. Carothers was asked in his deposition -- I don't have it in front of me at the moment, but we can provide it, Your Honor -- but Mr. Carothers was asked in his deposition the basis for his conclusion that the program -- that graduated response was effective at stopping infringement. And he pointed to the 96 percent study.

Now, he indicated that he had only seen that in his deposition preparation. So he certainly didn't know it at the time.

So the idea that Mr. Carothers is going to take the stand and say, well, he believed that graduated response was effective, there is no foundation for it. They would have had to have produced something in discovery to show it.

Now, the problem is, if I ask the question, well, Mr. Carothers, you're not aware of any studies, he'll then refer to the very study that the Court has excluded, I presume. And I don't want to open that door.

THE COURT: Well, he should be educated not to do that before. But -- so, you know, on the last day of discovery you got the e-mail from Beck that listed numbers of infringement notices, and the fact that they are going down. And that came from somewhere.

And really my question is, was somebody paying attention to those numbers in trying to determine whether their program was effective in a timely fashion? And that was what I was trying to get at.

Because Weber's testimony is not relevant if Cox had no idea whether their graduated response program was effective or not. And so, that's what I'm trying to get at.

MR. OPPENHEIM: Your Honor, I completely agree. Weber can analyze today what happened then all she wants, but they did no analysis then. And they can have their witnesses get up and say, without any support whatsoever, oh, we thought it was effective, but they have no basis for saying that.

And so, Weber shouldn't come in to retroactively try to give credibility to that testimony. Which, frankly, shouldn't be permitted because there is no foundation for it.

THE COURT: Well, that's why we have trials is -- and that's why there is cross-examination. And I understand. And that's why I'm asking the question. And I am getting two different answers.

And, clearly, if there is no foundation for Weber's testimony, it doesn't come in. But I don't have -- the genie is in the bottle. You know, I have got to -- we have to wait to hear the evidence. So if somebody testifies and they have no basis, you move the strike the testimony, and I will rule on it when that occurs.

MR. OPPENHEIM: And just so I'm clear here, and I apologize if --

THE COURT: No, I understand.

MR. OPPENHEIM: -- I am being a little slow on this.

THE COURT: Yes.

MR. OPPENHEIM: I am allowed to ask the witness, you have no studies, you conducted no studies to confirm this at the time, and they are not allowed to refer to the 96 percent study?

THE COURT: The 96 has been struck. Well, you know, is it Carothers? Is Carothers -- you expect him to say, whether its accurate or not, I relied on the 96 percent study?

Is that what you think he's going to say?

MR. OPPENHEIM: I don't know what he's going to say, Your Honor. In his deposition he said he wasn't aware of it until he prepared for his deposition.

So he certainly at the time didn't know. So it should be out on that basis alone.

THE COURT: Certainly, he can't testify -- that's not -- that's hindsight, and it's completely irrelevant what he learned at the time of his deposition. And if there is an objection to the question, it will be sustained.

MR. OPPENHEIM: Very well, Your Honor.

Would you like me -- the issue of Ms. Trickey was raised. I'll put a pin in that and come back to it if Mr. Elkin wants to respond.

THE COURT: Yeah, why don't we hear about the -- the hand-selected customer responses, I guess, that Ms. Weber would testify to.

MR. BUCHANAN: So, Your Honor, in every notice of copyright infringement that came into Cox that was forwarded to a subscriber, there is a reference there to -- not to contact necessarily Cox, but to go to the RIAA or to MarkMonitor, and there is a phone number.

And tried to -- we got some of that data from MarkMonitor, but it was very limited, they didn't keep a lot of it. But we did get a lot of e-mails back from Cox subscribers

because they, I guess, were hesitant to go outside the system.

And then Weber looked at those. And she is a behavioral expert. And she looked at those in consideration with her other data to determine, you know, okay, what are the reasons that people are stopping? And what this reflects is those people's state of mind, the reasons they're giving. And she did not just pick the best 20. She has reviewed all 1,700, and she has a chart in terms of what they all reflect.

For her deposition at that time, she randomly picked 20, I think she testified to that. And those 20 indicated various things.

But I should point out that the CCI did something similar before they established CAS. They did a study, and I think this will come into evidence, where they went out on behalf of the plaintiffs and others to try to determine, you know, what is a good way to stop copyright infringement.

And several of their witnesses, their corporate representatives, all say gradual response systems. That's what we were trying to push, because that's what we believed from our internal study, and CCI did a thorough study, that people that get five or six are innocent infringers.

So that -- there is a whole industry thinking going on that Cox was a part of about, you know, what was a good gradual response? What's the point? Why do you not send the first one?

Because we have anecdotal evidence that people are dropping off based on e-mails. Mr. Beck will testify about that, and others will testify about these e-mails that they got at their desk in response, and they reviewed them and they talked to people.

And that's the whole part of the gradual response system, so they can authenticate those as something that were coming in at the time. And the phone calls were similar.

And all this reflects is -- so they can be authenticated, there is a foundation. And they are relevant because they show, you know, what Cox believes is happening and why Cox believes a gradual response is working. And that all these people aren't just out there intentionally infringing. Which is the same thing that the plaintiffs found through the CCI and their study.

And that's why there is the run-off.

THE COURT: Okay. Thank you.

MR. OPPENHEIM: Your Honor, that raised so many issues for me, it's hard to even know where to start.

First off, the idea that Dr. Weber -- now she is a behavioral expert. Before she was a statistician. Then she was a consumer survey person. And she did this -- she has apparently expertise in anything you need.

Putting that aside for the moment. The fact that she -- the idea that she has now done a complete review of

1,700 e-mails, has some chart, is going to testify on that, when that wasn't in her report, she hadn't done it at the time of her deposition, to me that shouldn't be permitted. That's all new.

I don't know why Dr. Weber is allowed to appear in the first instance, but the idea that she gets to come on new studies is totally out of bounds. That's number one.

Two, what Mr. Buchanan just described is exactly why we think CAS and these e-mails need to be out. I mean, we're just exploding the contours of this case. The idea that they're going to bring in a study done in relation to CAS, which is an entirely different program, and they are going to use that to bootstrap what they were doing, right, and suggest that there were innocent infringers at Cox -- the very -- you already ruled that the e-mails shouldn't come in for that purpose, but that's exactly what they are trying to do.

That kind of testimony should not be permissible, Your Honor. This trial -- you know, let's go through mid-January then, because we're going to explode this thing beyond any ability to have any structure on it.

THE COURT: Well, I ruled the way I did because I thought that the jury was entitled to know that the ISPs and the music industry were working -- in an attempt to work together to stop infringing.

And although Cox didn't sign onto it, that some of

the plaintiffs signed onto it. That it doesn't talk about termination. And because I'm sure you have witnesses who are going to identify the fact that ISPs weren't interested in talking about termination, or at least I assume that's the case.

But it has some -- it has some relevance. You know, there -- you have talked about the context and the DMCA, the jury needing context, and I think that this is fair context as well.

MR. OPPENHEIM: Just by way of background. So CAS did not relieve those ISPs of their legal obligations under the copyright laws.

THE COURT: Correct.

MR. OPPENHEIM: And that's what the witnesses will testify to. And so, notion that you're going to compare what was in an educational program in CAS to what the legal obligations of Cox were is apples and oranges and is intended to confuse the jury. It is intended to try to get the jury to say, well, in this educational program, six notices was okay. So obviously the graduated response process that Cox had was okay because graduated response was good here, it should be good here.

But it's apples and oranges. And it will confuse the jury, there is no doubt it will confuse the jury. And now when we bring it to the level of now we're going to admit studies

that talk about innocent infringers that they're going to use to bootstrap e-mails that are coming in that their witnesses are going to testify, our subscribers weren't infringing -- what I would like to go back to, Your Honor, is your opinion in the BMG case on the safe harbor.

And this goes to the collateral estoppel issue that Your Honor reserved on. They intend to put forward evidence that is entirely contrary to this Court's findings in that litigated case. Their witnesses exchanged e-mails that said 99 percent of this activity is purposeful. And now they want to put on evidence that says just to the contrary. So --

THE COURT: Well, isn't that what -- to the extent they have evidence that the opposite was true, that other people were getting other information, that's also relevant. And I don't know what that evidence is going to be. I don't know the evidence as well as you all do.

But certainly they can be cross-examined on it. But, you know, to the extent they have that kind of evidence -- now, Dr. Weber, I'm not sure she is a doctor, whatever, but she is not going to testify about anything that wasn't in her report and was generated after her report and deposition. That is not going to be permitted. That will be excluded.

So I don't know what -- anything about where the line should be drawn. But certainly Cox needs to be on notice that -- and so are you, that your experts are limited to the

reports that they provided. And to the extent that there is a demonstrative that covers testimony, those will be permitted. But not newly-generated evidence outside of that time frame.

And, you know, the customers' responses that have been selected, that will be something that we'll address as the trial goes on.

MR. OPPENHEIM: The 20 that she relied on --

THE COURT: The 20 that she relied on.

MR. OPPENHEIM: -- to conclude --

THE COURT: I'll need to understand the context, and we'll need to do that before she takes the stand.

MR. OPPENHEIM: Okay, Your Honor. Very well.

Oh, the issue of Ms. Trickey --

MR. ELKIN: Can I --

THE COURT: Yeah, go ahead, Mr. Elkin. Why don't we let Mr. Elkin respond.

MR. ELKIN: We all may have lost the thread because it had to do with 15 minutes ago, but I just wanted to comment with regard to the -- to the witnesses.

First of all, of course we read Your Honor's decision. We are not going to elicit testimony related to that Cadenhead slide.

But the question -- there were questions in their depositions that went outside of studies. The witnesses all testified -- in fact, Mr. Zabek and Mr. Sikes were questioned

for seven hours about these very issues. And that testimony is going to come in by video as well.

So there is ample testimony from Mr. Vredenburg, who will be here, on all the safety -- these folks lived -- whatever you want to think about these gentlemen and whatever intemperate remarks they made in their e-mails, they lived and breathed this customer notification set of issues.

So I just wanted to say, while there is no specific study, and Your Honor ruled the way it ruled, there will be a lot of customer information evidence that will be put forth here.

THE COURT: Okay.

MR. ELKIN: Thank you, Your Honor.

THE COURT: All right, thank you.

MR. BUCHANAN: Your Honor, could I just spend one second on the -- just so the Court is aware of the 1,700 e-mails. We produced those. She referenced those in her report. She just took 20, okay, and just -- and they cross-examined her about those.

THE COURT: Twenty.

MR. BUCHANAN: So those were -- those were reflective of the total. She randomly -- and so, the idea that somehow they are being surprised, they had all those. They could have showed them all to her.

And so, the fact that she might now, you know, is

going to have a chart that says, here is what they sort of reflect, it reflects the 20 as well, but it goes for the entire amount. So it's not -- I just want to emphasize, there is no surprise here.

THE COURT: Okay. Thank you.

MR. OPPENHEIM: Just for the record, Your Honor, that couldn't be further from the truth. I mean, she came to certain conclusions and opinions in her report. I asked her about them in her deposition. She relied on 20 e-mails that she attached to her report. She made no reference to the other ones.

If she has now bucketized 1,700 e-mails in some analysis that she has done, we've never seen it.

THE COURT: All right. Well, then prepare something in writing before she is going to take the stand and let's not reference the specific study until I make a ruling on it after I've gotten that information.

All right. Other than pedestrian matters like how much time do you want for opening statements, that's pretty much all I had this morning.

MR. OPPENHEIM: Maybe I could start by addressing the Trickey, Linda Trickey issue that was foreshadowed.

THE COURT: And Delgado, if you haven't resolved Delgado.

MR. OPPENHEIM: Well, with respect to Ms. Trickey --

THE COURT: Trickey, go ahead.

MR. OPPENHEIM: We would like to call her in our case in chief. She was a 30(b)(6) designee by Cox on various topics associated with the graduated response program, Cox's policies and procedures. And we have asked Cox to produce her and are prepared to, of course, honor the Court's indication that Cox should then be permitted to either examine her then in our case or wait until later. That's fine with us.

Cox has indicated that because we only moved with respect to Messrs. Carothers and Beck, that we can't ask for Ms. Trickey now. And it is true, we did not include her in the motion, but, you know, preparing for a trial is a dynamic thing and we now realize that our presentation to the case to the jury will make a lot more sense if her testimony is presented up front.

And so, we would ask that since she's going to testify anyway, that she be permitted -- we be permitted to call her in our case in chief.

THE COURT: All right. Mr. Buchanan.

MR. BUCHANAN: There is a little more to that, Your Honor. Is that we gave them a reason why she wasn't available that first week for their case. And that's because she's the expert in security matters for Cox from a legal perspective. There was a recent statute, law passed in California, consumer law that is very substantive and significant. And she has been

assigned to analyze this company wide and make presentations.

So they did not list her as a will call witness. They listed her as may call. They didn't make her part of their motion. We understand the Court's order, but she now has taken on these assignments for that first week at least. However, she will be here. And we've told them that we'll let you leave your case open and then you can do your examination of her outside the scope of direct, if you need be, and in our case.

But this particular witness has now taken on work that is very important to the company, and her schedule doesn't allow her to come up in their case.

Now, if the Court orders her, then obviously that's that, but I think there should be an accommodation. We are bringing Carothers and Beck. We are basically having to shift like all of our witnesses into their case. We only have like two fact witnesses now in our case. It's going to be very awkward to the jury, I think.

And so, this particular witness is not crucial to their case. She is a lawyer. But we've had said, look, we'll bring her up, and you just do her in our case so that she can cover the work that the company has asked her to do and that she signed up to do some time ago.

THE COURT: All right. Thank you.

Mr. Oppenheim.

MR. OPPENHEIM: Mr. Buchanan is correct. They did tell us that she had some work obligations. They didn't describe what he just described, which I've been involved in briefing companies on pending legislation, there is rarely a burning moment in that. That's the way legislatures tend to act these days.

And what they did say is that if the Court ordered her, she would be here. And we believe that it will allow for a much cleaner presentation to the jury of the issues.

THE COURT: Well, is her testimony cumulative? What is -- how many witnesses are you going to have talking about Cox's graduated response program?

MR. OPPENHEIM: We're trying -- well, that's one of the reasons we wanted to call her in our case, is to be able to get through with her an issue that we then won't have to deal with with other issues, that she was the designee in the 30(b)(6).

And so, we are trying -- if we can't call her in our case and we haven't set a framework for the jury on some of the background issues that she was the witness on, then we have to try to do that with another witness where they weren't the witness who necessarily provided the testimony in the 30(b)(6) deposition. And then we do have a cumulative issue.

THE COURT: Well, do these other witnesses have personal knowledge of what Ms. Trickey testified to?

MR. OPPENHEIM: I hope so, but we don't know for a certainty and don't know how resistant they will be to providing that testimony.

So what we are trying to do, Your Honor, is in light of all your rulings is to hone our case and put a presentation together that isn't repetitive with the witnesses. And our presentation would have Ms. Trickey as the first of the Cox witnesses we would call to lay the background on the things she testified to.

THE COURT: All right. Then she will be required to appear for the plaintiffs' case in chief. And hopefully she can work from the East Coast when she is not in the interim period of time.

All right. Is Delgado still a witness? And if so, is there --

MR. BUCHANAN: That's not an issue, Your Honor.

THE COURT: Okay.

MR. GOULD: Just for clarification, ask for a clarification. I take that to mean you're not planning to present him at trial?

MR. BUCHANAN: No, Your Honor.

THE COURT: Okay.

MR. GOULD: Thank you.

THE COURT: All right. Then what else do we have this morning?

MR. OPPENHEIM: I believe the remaining issues, Your Honor, are pedestrian, as you said, but important.

THE COURT: Yes.

MR. OPPENHEIM: So the first being the -- obviously and critical, is the length of the trial.

On that issue, Your Honor, the BMG case went for ten days. They had just one plaintiff. And for them, their notices were thrown away, essentially.

We have six plaintiffs, plaintiff groups. And we have to -- we need to have at least one witness from each of the plaintiff groups, and we have to explain what happened to the notices.

We are cutting to the core. We believe that we can do it within six days. We were at seven, we are now at six. I know Your Honor wanted four. And, believe me, with the holidays upon us, we would love to do that and we're trying, but I just don't see how we can get below six.

We did discuss this with the Cox folks. They said that they were prepared to live with four. And we've tried, we just don't see how we can do that, Your Honor.

So with that -- I mean, we will cut as the trial goes as much as possible. But from what I'm hearing today, it's actually making me worry that even six will be worrisome just because if we're going to be getting into things like CCI studies and we're to go through 1,700 user e-mails -- I just

don't know where this trial is going to go.

And I don't want to be in a position where we use most of our time putting our direct case on and we can't cross on all of this other stuff that goes forward.

THE COURT: Okay. Mr. Buchanan.

MR. BUCHANAN: We are happy to go with four. We can put our case on in four. The plaintiffs elected to come here, not to go to Atlanta, so they knew that in a case of this size, that's typically -- it's four days of trial. They decided to front-load their case with all of our witnesses. That's their choice, the Court has allowed them.

And so, we don't think the case should go longer than that. The jury would get lost along the way.

This notion of 1,700 e-mails, whether the Court allows that or not, that's like five minutes of testimony. There were 1,700 e-mails, and I have done a chart, assuming the Court allows that, that is not delaying the case.

The CCI study is like five minutes of a reference to this study that talks about innocent infringement. Those are red herrings.

So we believe the case can be done in four days, and it should be. They elected to come here. They elected not to go to Atlanta. They elected to put their case on through -- all our witnesses through their case. So I think that's how it should work.

THE COURT: All right, thank you.

Well, you know, it's the plaintiffs' burden to prove their case, and it's not unusual for a plaintiffs' case to require more time than a defendants' case, but I'll have to see how this is going.

You know, the -- rule number one is fair administration of justice and allowing parties to put on their case and not precluding it by some arbitrary number. I looked at the BMG case, and as in this case, there was a lot of work done preliminary so that the case could be tried. Inevitably there are delays where we're talking about issues before witnesses testify that aren't counted against either side.

And in the -- at the end in the BMG/Cox case I didn't keep a clock. And there were witnesses who were put on and allowed to testify one time for both purposes of both parties.

So we have time to allow five days and not scare the jury in that -- getting into that third week. So I don't -- but I am going to be really diligent in making sure that this doesn't become a runaway train.

I mean, the -- you've got six groups of plaintiffs, but, you know, after the first two testify about what their jobs are and who they represent and what they're doing here, I can't imagine that having the other four do the same has any usefulness to the jury.

So let's really look at what you are doing. And I

see a lot of witnesses, but the issues in the case I think are fairly discrete.

And so, I understand your position, I'll work with you and you work with the Court. Okay? All right.

MR. BUCHANAN: Your Honor, I think one other issue, administrative, and then there is a substantive issue I wanted to raise. I think we've agreed that one hour for opening?

THE COURT: All right, that's fine.

MR. BUCHANAN: And then the other issue I wanted to raise, Your Honor, is in your November 15, 2009, summary judgment order with regard to the notices and whether they put Cox on notice of copyright infringement at a certain level, the Court found that the RIAA sent notices on behalf of both the record label plaintiffs and the music publishers.

It's undisputed in this case that the music publishers sent no notices. So those 3,000 works in suit that are identified, I think, in Exhibit B of the complaint for the music publishers, there were no notices sent by them. They are not part of the RIAA. No notices were sent.

And so, basically, they are trying to bootstrap off the notices that were sent on behalf of the record label companies.

So, in fact, if you read your decision about why the notices -- because of the information they contained put us on notice, they did not put us on notice of music publishers.

There is no mention of any of them on those notices. They never sent any.

So that's another way to streamline this case, is because those, as we moved, and based on your Court's ruling applying the same logic, they should be out.

So we really should just be talking about the notices that went on behalf of the record label companies and those works in suit. Which, actually, when you reduce them down, there is like 2,000 because the notices with regard to those contain references to songs in which they have Bruce Springsteen, Born to Run, and embedded within that is somebody that's gone out there and added all sorts of other works that don't relate in like a zip and we're suppose to have notice of that. Those were two issues that we raised.

But the one right now is, clearly, under the Court's logic and reasoning in the summary judgment decision, there is no way we could be put on notice of the musical compositions of the music publishers.

THE COURT: Okay. So this is a motion to reconsider? Yes, sir.

MR. OPPENHEIM: There is a little -- too cute by halves in there, Your Honor. I mean, I do agree with Mr. Buchanan that the opinion does say, notices from record companies and music publishers, that is certainly true.

It was clear that the Court rejected Cox's argument

that every notice had to specify every work that was being infringed in it. The Court followed what the Fourth Circuit said. Which is, was it sufficient notice for Cox to do something about it? And that's what those notices were.

So here, compositions are contained with sound recordings. Right? And so, Mr. Buchanan saying, well, there was no notice as to the compositions, well, of course there was. There was no need to send a separate notice, which would be the exact same notice, only specify the composition. It would be the exact same infringer, the exact same date and time, on the exact same network. It would be exactly the same.

So the Court -- the Court has made a finding, which was undisputed, that Cox had knowledge of the infringing acts such that they could do something about it. And nothing that Mr. Buchanan has said should disturb that. He's just pointing to the one phrase within the opinion which, you know, he thinks is a little inelegant. But the point of the decision is very clear and should be undisturbed.

THE COURT: All right. Yes, sir.

MR. BUCHANAN: Just briefly, Your Honor. I mean, it's under Rule 54(b), and it is a timely motion. We haven't filed it. We haven't it filed, but we are arguing it now. There is no dispute that there is a mistake of fact. The plaintiffs just admitted that.

THE COURT: I will look at it, Mr. Buchanan.

MR. BUCHANAN: Okay. Thank you.

THE COURT: Yes, sir.

MR. BUCHANAN: So when you said you will look at it, you want us to file a formal motion?

THE COURT: No, no. I'll look at it. We will go back and we will take a look at what you've just said. And if we think we made an error, we will let you know.

MR. BUCHANAN: Right. And the only other point I'd make is the general counsel of the RIAA, you know, testified that they don't represent the music publishers, in admissions 6 through 12 they admitted that.

And in their statement of undisputed facts, they say that the notices were by the RIAA, they only represented the record labels.

So there's no notices that reference at any time the music publishing companies and their compositions.

THE COURT: Okay.

MR. OPPENHEIM: Yeah, it's undisputed that the RIAA represents record companies. Doesn't mean that the notices didn't cover musical compositions. It's just --

THE COURT: Okay.

MR. OPPENHEIM: So, Your Honor, unless you wanted to hear more on this, I had two other pedestrian matters.

THE COURT: No. Go, please.

MR. OPPENHEIM: I assume, based on what you said,

that we will be sitting on Fridays?

THE COURT: Yeah, we will be sitting on Friday, next Friday for sure. The following Friday we will see how -- we may be done by then.

MR. OPPENHEIM: That would be great. I said two issues, I actually have a few more pedestrian. Sorry.

On the sequestration of the witnesses, it's all right for the witnesses to hear the opening statements, I presume, just not witness testimony? Or --

THE COURT: No, I don't want them to hear opening statements either. Let's just have them removed so we don't worry about them hearing that Mr. Jones is going to say A, B, and C. We don't need to be concerned about it.

MR. OPPENHEIM: Okay. As to experts, however, Your Honor, I assume that the sequestration rule doesn't apply to them?

THE COURT: No, not unless there is something unique that I haven't heard about, the experts will be allowed to remain in the courtroom.

MR. OPPENHEIM: I don't believe so, Your Honor. There is nothing unique.

THE COURT: All right.

MR. OPPENHEIM: I believe we all submitted voir dire, proposed voir dire and jury instructions last night. I don't believe that we have a deadline in place for submission of a

proposed verdict form. We discussed it last night and decided it was something we should raise with Your Honor when you would like a proposed verdict form.

THE COURT: Yeah, I would like one. Obviously, if you can agree on a proposed verdict form, that would be helpful. If you can't agree on it, it's something we will talk about. But I would like you all to generate the first versions of it so that we can look at it.

MR. OPPENHEIM: Do you want that before the trial begins, Your Honor?

THE COURT: Yeah, it would be preferable, but not -- it's not something I would read to the jury at the beginning of the case and be involved in, but it's normally provided with the jury instructions.

So if you all can get to work on that -- you know, I don't need it until Monday. Hopefully you are all going to take a step back and be with your families over Thanksgiving, but I'm sure you will be back in action by Sunday. So maybe Sunday you can get together and just have something to me on Monday is fine.

MR. OPPENHEIM: Okay.

THE COURT: So you went over the jury selection. You think you have got that down? As I had indicated, at some stage I'm going to call eight jurors, they will all sit, and they will remain to deliberate. So that if we lose a couple,

we're still okay.

So we're going to pick eight, they are going to go into the box. Obviously, we will have weeded out those that shouldn't be in the jury. And then if you don't strike somebody, they're in, as we go to the second round.

And I think we are trying to get you the pool today. Is that -- if not, it will be available tomorrow.

The number of strikes has come up. And do you want -- have you talked about that? Do you want to address that?

MR. OPPENHEIM: Your Honor, as I understand, it's either three or four. I guess my preference would be four, but I don't feel hugely strongly about it. Given the number of issues here, my preference, where there is a potential bias, I think four would be preferable. But I will let the defendants speak to that.

THE COURT: I don't have any objection to that, four is fine.

MR. BUCHANAN: Four works, Your Honor.

THE COURT: Yeah. All right. We will do four.

We don't have any push polls going out, right? There is nothing going to our jury pool? I had a case with a gentleman from Texas who had done a push poll, and I frankly had to say I had never even heard of it. I thought while I was in private practice I had heard of most polls. But that was

amazing.

MR. BUCHANAN: I have a case with that lawyer right now, Your Honor.

THE COURT: You do. Jeez, I was just stunned.

MR. BUCHANAN: It's worse than you can imagine.

THE COURT: That was stunning. All right.

MR. OPPENHEIM: With respect to the proposed verdict form, do you want us to file those on ECF, or just submit them to the Court by a --

THE COURT: ECF is great.

MR. OPPENHEIM: Very well.

THE COURT: That way you can do it whenever you get a chance.

MR. OPPENHEIM: I don't believe I have any other housekeeping matters. We have some questions for your staff, your clerks, we will deal with them directly. Thank you, Your Honor.

THE COURT: Okay. They are probably better qualified to answer those questions.

All right. Mr. Buchanan, anything else?

MR. BUCHANAN: Nothing, Your Honor.

THE COURT: All right. I hope you all have a good Thanksgiving. And, you know, make that Sunday night call and say, hey, you know, how about settling this case and --

MR. OPPENHEIM: We are still waiting for it, Your

Honor.

THE COURT: It's never too late. All right. Thank you all. We're in recess.

MR. ELKIN: Thank you, Your Honor.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

/s/ Norman B. Linnell

Norman B. Linnell, RPR, CM, VCE, FCRR